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## WORKPLACE SEXUAL HARASSMENT

*“Is the law on our side?”*

–Shakespeare, *Romeo and Juliet*

### OVERVIEW

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Sexual harassment litigation has exploded in recent years. The explosion is due primarily to the passage of the Civil Rights Act of 1991 and an increased and increasing public awareness of sexual harassment in the workplace. The 1991 Civil Rights Act allows people who claim they are victims of sexual harassment (plaintiffs) to request jury trials. The Act also allows the plaintiffs to seek both compensatory and punitive damages from the defendants which in most cases are companies. Publicity, jury trials, and the widening array of damages being handed down in the courts in recent years may be encouraging employees with sexual harassment claims to pursue them by initiating litigation. In earlier times such employees

might have chosen to remain silent or to pursue less litigious avenues of relief or satisfaction.

Many employers are responding to the challenge. In general, such employers adopt anti-harassment policies and provide training designed to eliminate sexual harassment incidents in the workplace. In spite of such policies and training, the litigation boom continues to grow. **Recent state and federal court decisions make clear that it is insufficient for employers simply to draft anti-harassment policies and investigate internal complaints.** Rather, to protect their companies from liability, employers must aggressively enforce stringent anti-harassment policies and take prompt remedial actions for transgressions. Even after instituting an anti-harassment policy, employers must **demonstrate an executive and managerial attitude of zero tolerance** for violations as a show of their commitment to the company policy. The actions outlined below are means of instituting and supporting anti-sexual harassment policies.

## THE LAW OF THE LAND

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Title VII of the Civil Rights Act of 1964 says that it is *an unlawful employment practice for an employer . . . to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's...sex*. Sexual harassment is classified today as one form of discrimination, and the definition of what actually constitutes sexual harassment continues to evolve in our legal system. As litigation on the matter increases in volume across the country, courts are identifying behaviors that fall within the legal definition of sexual harassment. The courts are also identifying behaviors that are not considered sexual harassment, i.e.,

behaviors that withstand scrutiny under a reasonableness standard. As an increasing number of types of workplace behavior are found to fall within the sexual harassment boundary, employers are generally well served by being aggressive in an attempt to both prevent and correct sexual harassment incidents. The more vigorous the programs, the better the chances of avoiding liability.

## **SEXUAL HARASSMENT CLAIMS**

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There are four major issues that may lead to claims:

### **General Harassment**

Traditionally, Title VII litigation required that sexual harassment claims rest upon sex and sexual conduct. Recent judicial decisions, however, have enlarged the range of incidents which can be used as the basis for a harassment claim. For example, an allegation of gender-based animosity will now sustain a sexual harassment claim. This means that harassing, abusive, and crude remarks may constitute sexual harassment even though a manager or supervisor directs the comments to all of his or her employees, both male and female. **Where a manager's or supervisor's conduct is so severe and pervasive that it alters the conditions of employment and creates a hostile, abusive work environment, a court may sustain the claims of a sexual harassment plaintiff.** In addition, the law recognizes that male employees may suffer sexual harassment at the hands of female co-workers or managers. Male plaintiffs have successfully sued their employers for sexual harassment by their female supervisors.

## **Same-Sex Harassment**

With respect to same-sex harassment, the courts differ about whether Title VII prohibits same-sex harassment. One federal court held that a male supervisor's harassment of a subordinate male employee was not actionable, despite its sexual overtones. The court reasoned that Title VII seeks to eradicate an atmosphere of oppression by a dominant gender, not by the same gender. Other federal courts, however, hold that Title VII is not limited to heterosexual harassment and that same-sex harassment is actionable under Title VII. Individuals may regard sexual advances as unwelcome regardless of the offender's gender. Further, state courts have permitted plaintiffs to pursue same-sex harassment under state law. The issue of whether same-sex harassment is actionable under Title VII is one that will likely be resolved in the near future. The U.S. Supreme Court recently accepted a case on this issue for review.

Harassment based upon sexual orientation, however, is not actionable under Title VII. Courts reason that Title VII prohibits harassment on the basis of gender, not sexuality. Harassment of homosexuals and lesbians is potentially offensive toward men and women in equal measures. Therefore, harassment of lesbians and homosexuals because of their sexual orientation does not qualify as gender discrimination actionable under Title VII.

## **Quid Pro Quo Harassment**

The law recognizes two forms of sexual harassment for which an employer may be liable. The first is quid pro quo (one thing in return for another) harassment. This type of harassment occurs when either (1) unwelcome sexual favors are a condition of one's employment; or (2) unwelcome sexual favors are sought by threatening or actually causing a tangible detriment to one's job. Employees generally assert quid pro quo claims against managers or supervisors when

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they find themselves forced to choose between submitting to a manager's or supervisors' personal demands and the loss of job benefits, promotions, or employment. Most courts that have dealt with quid pro quo sexual harassment claims **have held the employers involved to be strictly liable on public policy grounds**. In general, when management people are found to have abused their authority, employers are declared liable because they were the parties best suited to prevent such abuse.

Until recent years, courts required quid pro quo harassment plaintiffs to demonstrate that they suffered tangible economic detriment as a result of their manager's or supervisors' unwelcome sexual advances. Recent court decisions, however, indicate an erosion of the "economic harm" element. One federal court held that a quid pro quo plaintiff need only show a "threat" of economic harm, rather than actual economic harm. Another court found that a supervisor's threat to make life difficult for the plaintiff if she did not resume a relationship with him constituted a detriment to the plaintiff's terms or conditions of employment. Because the supervisor linked non-hostile working conditions to acceptance of his sexual advances, he was harassing her in a quid pro quo manner even though she did not suffer actual economic loss. The disintegration of the economic harm element has reduced the burden of proof on the plaintiffs in quid pro quo harassment suits.

***CASE A:** Patricia was employed as a waitress at A's Bar & Grill. A's was owned and operated by B Enterprises and managed by Donald. While working at A's, Patricia was subjected to continuous sexual harassment. The harassment consisted of unwelcome sexual comments and physical contact from Donald. At one point Donald offered Patricia two hundred dollars of his own money to have sex with him. Some time after she refused, Patricia noticed that her hours of work were decreased. Another time Donald suggested to Patricia that she*

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*could become an assistant manager at the Bar & Grill. The offer, however, was linked to Patricia's acquiescence to Donald's personal proposals. Patricia refused again; she did not receive the promotion. Soon thereafter she did not receive an anticipated salary increase. Donald indicated that she did not receive the raise because she refused to have sex with him. Patricia filed suit against A's Bar & Grill and B Enterprises. The court held that B Enterprises was strictly liable for the quid pro quo harassment perpetrated by Donald and awarded monetary damages to Patricia.*

In Case A the court held the corporation strictly liable for the sexual harassment by its manager, Donald. The decision was justified because the manager relied upon the actual or apparent authority inherent in his supervisory position within the company to extort sexual favors. Because the employer vested actual or apparent authority in the manager, the employer was held to be strictly liable for the misuse of that authority.

### **Hostile Work Environment Harassment**

The second form of harassment for which employers may be liable has to do with the general work environment. To establish a sexual harassment claim in this area an employee must demonstrate three things: (1) That a supervisor or co-worker made sexual advances, requested sexual favors, or engaged in physical conduct of a sexual nature. (2) That the conduct was unwelcome. (3) That the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. In addition, in assessing whether a workplace environment qualifies as hostile, courts usually look at factors such as the frequency of the discriminatory conduct, the severity of the discrimination, whether the offender physically threatened the complain-

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ant or uttered offensive statements, and whether the conduct unreasonably interfered with an employee's work performance. Incidents that are relatively trivial or isolated will typically not lead to a finding of employer liability for a hostile work environment.

***CASE B:** A male employee at a manufacturing plant frequently used sexually explicit language around a female co-worker and frequently touched and fondled the female co-worker. The female employee lodged complaints with the plant supervisor. The supervisor took no action for several months and the harassing conduct continued. Finally, the male worker was transferred to a different shift. Other male employees, however, continued his course of intimidation. The woman finally resigned from her position and filed suit against the employer.*

In this case the court found that the female had established the requisite elements of hostile work environment harassment and awarded monetary damages. The harassment was unwelcome; the employee was singled out and suffered the harassment as a result of her gender, and the harassment was sufficiently severe and pervasive to alter the conditions of employment and create an abusive working environment. The court held the employer responsible because the employer knew about the harassment but failed to take reasonably prompt and adequate corrective action.

While most hostile work environment lawsuits are aimed at unwelcome conduct that occurs within the confines of the workplace, some lawsuits have to do with conduct between employees **outside the workplace**. For example, recent cases have included incidents which occurred at out-of-town business conventions and at after-hours social gatherings. An employer's liability for situations involving off-premises conduct is not automatic. The law remains unsettled as to when and if a hostile work environment can include

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events outside the normal work place. While intuitively it might seem that off-premise conduct lies outside the realm of employer responsibility, off-premise work may be inextricably entwined with job-related responsibilities. To guard against liability for any such harassment, employers should make sure their written policies cover off-premises work. Then, employers should treat complaints involving off-premise incidents with the same seriousness given to other complaints of sexual harassment.

To summarize on hostile work environment claims, when an owner, manager, partner, or corporate officer is found to have personally participated in harassment, courts automatically impute the harassment to the employer. On the other hand, when an employee's co-worker perpetrates the harassment, an employer will be liable only if the complainant demonstrates that the employer (1) authorized, knew, or should have known of the harassment and (2) failed to take reasonably prompt and adequate corrective measures. Courts hold that employers had actual or constructive knowledge of the harassment if the complainant either registered a complaint at the managerial level or the harassment was so pervasive that the employer should have known about it. An employer will be liable for such harassment if it fails to take remedial action reasonably calculated to end the harassment.

## HOW TO MINIMIZE YOUR LEGAL TROUBLES

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The intent of the law as it is being interpreted in the courts over time is to reduce to zero the incidents of sexual harassment people encounter in the course of their employment. To comply with the law, employers need to proactively seek to eliminate sexual harassment within their organizations. Following are six actions business leaders can take to stay in compliance with both the spirit and letter of the law of the land.



### **1. Set expectations. Write and maintain a written anti-sexual harassment policy.**

The creation of a written anti-sexual harassment policy is a big step toward setting the stage for desired behavior. The written policy should explicitly define and prohibit sexual harassment, explain the procedures for filing a complaint with an independent representative of the employer, and encourage the prompt reporting of all complaints. The policy should contain assurances that all complaints will receive thorough, impartial investigation and resolution; that investigations will remain confidential to the extent consistent with an employer's obligation to investigate; and that all personnel, including executives, managers and supervisors, are equally subject to the policy.



### **2. Broadcast expectations. Let every employee know what is expected.**

An anti-sexual harassment policy loses its effectiveness quickly if the only copy of the policy is buried in the personnel manager's desk! Employers need to ensure the wide dissemination of the

policy—first to existing members of the organization, and then to new people coming aboard. Experience shows that compliance with policy provisions and the effective utilization of incident reporting procedures depend upon employees' familiarity with the policy. Copies of the policy should be included in employee handbooks (see Chapter 8); copies can also be posted on employee bulletin boards. Some progressive firms include mention of the policy in their in-house newsletters.



### 3. Establish crisp reporting procedures.

An effective reporting system will enable employees to present their complaints and concerns to their employer quickly and without fear of retaliation. **Trust is an essential factor in implementing an effective reporting procedure.** Employees will not report claims if they believe they will face ridicule, inaction, or retaliation. Fostering trust requires leadership that includes an open, sympathetic ear for employees with harassment claims. More specifically, experience across a cross-section of companies indicates that it is best to identify more than one individual to whom employees can report complaints. In addition, it seems to be productive if there are several channels for complaints such as in person, after hours, via suggestion box or interoffice mail, or at staff meetings. For cases in which the designated individual or an immediate supervisor is the offender, the company needs to institute a procedure for bypassing those individuals. Some companies appoint an outside individual, such as a director or the firm's outside legal counsel, to serve as an alternative vehicle for registering harassment concerns. An employer should treat verbal and written complaints with equal seriousness.



#### **4. Investigate complaints promptly.**

Upon receiving a complaint, a designated and properly-qualified individual should promptly investigate the situation. The investigator should guard against conducting the investigation as an inquisition. Rather, the investigation should proceed as a fair and impartial fact-finding process that leads to an objective decision. The employer should consider using two interviewers during the investigation: one to interview the complainant, alleged offender, and any other necessary witnesses, and one to note the facts as they emerge during the interviews. The interviewers should not presume the guilt or innocence of either party until they have concluded the investigation. Throughout any investigation all parties and witnesses should feel confident that they will not face retaliation for participating. The interviewers (and employer) should seek a fair and impartial investigation and resolution. What is done should appear fair and impartial to outside observers. Employees who receive fair treatment are less likely to later file a lawsuit.

If the investigation is inconclusive, the investigators might wish to inform the accused employee that appropriate disciplinary action will follow the discovery of additional information. The accused employee should be aware that retaliation against the complainant will result in disciplinary action. The employer or investigator should periodically check with the complainant to ensure that the harassing conduct has ceased and that the employee does not perceive that he or she has been the victim of retaliation.

Prior to issuing a disciplinary decision, the employer should provide the accused employee an opportunity to be heard and to present rebuttal evidence. By providing all the parties with minimum “due process” safeguards, employees are more likely to feel that they have been treated fairly. If the investigation reveals that offensive conduct did occur, the employer should take prompt re-

medial action designed to stop future harassment. The discipline of the offender should match the severity of the conduct. Depending upon the nature of the harassment, the remedial measures could range from a verbal warning to counseling, suspension, transfer, demotion, or termination.



### **5. Conduct anti-sexual harassment training.**

Anti-sexual harassment training is an essential supplement to a written policy. A written policy alone may prove ineffective in defining harassment. A portion of the people in almost any business organization usually require concrete examples of appropriate and inappropriate conduct. Proper training provides an opportunity to demonstrate and discuss the propriety, or impropriety, of specific workplace behavior. For example, some employees might be unaware that certain conduct, such as sexually-explicit language, touching, and off-color jokes, is offensive to particular co-workers. Discussions, which can be a part of the training sessions, allow employees to voice their discomfort with particular behavior. Training sessions give the trainer a chance to explain the law and encourage employees' cooperation and understanding. For example, new or untrained employees might be unaware that their conduct violates the law and the company's policy. One other important benefit of training is that employees' questions may expose potential problems. Then an employer can take corrective action before little problems grow into big ones.

A final word on training: Periodic repeat sessions acquaint employees and managers with the issue of workplace sexual harassment. By keeping the issue out in the open, employees are less likely to engage in prohibited conduct and employers are less likely to face lawsuits and liability. Such training sessions also reaffirm an employer's commitment to the anti-harassment policy and to the employees' welfare in general.



## 6. Stay current.

The definition of, and liabilities for, sexual harassment conduct is evolving over time as complaints, claims, and lawsuits wind their way through our judicial system. People involved in building businesses are wise to take steps to remain abreast of developments in both state and federal courts.

# CONCLUSION

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Reducing the risk of lawsuits and liability is just good business. Employers need to be vigilant in their attempts to eliminate sexual harassment incidents across their organizations. Leadership backed up by written policies and training are the best tools for achieving this end. Sexual harassment, or claims thereof, are embarrassing to everyone involved, and they are disruptive. Morale, productivity, and self-esteem are all affected.

A growing body of federal case law confirms that employers may avoid liability for the acts of individuals by taking action to eliminate harassment. In addition to publicizing and disseminating a strongly-worded, anti-sexual harassment policy, employers need to institute effective reporting and resolution procedures. Then they must act resolutely on complaints. Employers may successfully insulate themselves from liability by promptly investigating claims and responding with remedial measures designed to deter future incidents of sexual harassment.



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